JD–111–97
Charleston, WV

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

DISTRICT 17, UNITED MINE
WORKERS OF AMERICA
(Joshua Industries, Inc.)

and

Cases 9–CB–7767
9–CB–7805

PHILLIP LEE WHITE, AN INDIVIDUAL

Deborah Jacobson, Esq.,
for the General Counsel.
Charles F. Donnelly, Esq.,(Hostler & Donnelly, L.C.),.
of Charleston, WV, for the Respondent.

SUPPLEMENTAL DECISION

Statement of the Case

WILLIAM G. KOCOL, Administrative Law Judge. In *Mine Workers District 17, (Joshua Industries),* 315 NLRB 1052 (1994), the Board issued a Decision and Order finding, inter alia, that Respondent violated Section 8(b)(1)(A) and (2) of the Act by causing the layoff of employee Phillip White. It ordered that Respondent, jointly and severally with Joshua Industries, Inc. (the Employer), make White whole for any loss of earnings he incurred as a result of the layoff.[1] On May 13, 1996, the United States Court of Appeals for the Fourth Circuit issued a judgment enforcing the Board's Order.

This case was tried in Charleston, West Virginia, on April 28, 1997, based on a compliance specification that issued November 5, 1996. As amended at the hearing, it asserts that Respondent owes White $22,007.96 in net backpay. Respondent filed a timely answer that disputes the amount owed to White and asserts a number of affirmative defenses.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following

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[1] As described by Administrative Law Judge Schwarzbart, originally this case was consolidated with Joshua Industries, Inc., Case 9-CA-28151. Judge Schwarzbart severed the cases and granted the General Counsel's Motion for Summary Judgment against Joshua Industries, Inc., finding that it had violated Sec. 8(a)(3) and (1) of the Act by laying off White. On August 20, 1992, the Board issued an Order affirming the decision of the administrative law judge. *Joshua Industries,* supra at 1052. Thereafter, on June 24, 1994, the Board issued a Supplemental Decision and Order finding, inter alia, that White was owed $25,741.06 in backpay by the Employer. On June 5, 1995, the United States Court of Appeals for the Fourth Circuit issued a judgement enforcing the Board's Supplemental Order.

Findings of Fact

I. Background

White was employed by the Employer, which operated a coal mine, from 1981 until his layoff on August 12, 1990. White performed a number of different duties, all involving the production of coal. The Employer had a contractual relationship with United Mine Workers of America, and White performed work covered by that contract. However, for historical reasons, White was paid in excess of the contractual rate until sometime in 1990. The Employer ceased operations and went into Chapter 7 bankruptcy proceedings after it had laid off White; those proceedings were still pending at the time of the hearing in this case.

II. The Specification and Answer

The specification asserts that the backpay period runs from August 12, 1990, the date White was unlawfully laid off, to January 28, 1991, the date that the Employer allegedly ceased operations and laid off all of its employees. Respondent denies that the backpay period ends as alleged; instead it asserts that the backpay period ends Decmber 29, 1990. The specification alleges that an appropriate measure of backpay is White's prelayoff average weekly earnings multiplied by the number of weeks in the backpay period. Respondent contends that a more appropriate measure of backpay is the average weekly earnings of an employee who continued to work for the Employer producing coal after White was laid off. It also disagrees with the amount of overtime used by the General Counsel in computing backpay. Respondent also pleads a number of affirmative defenses. It asserts that "The grievance filed by [White] was (is) without merit." Respondent also asserts that White failed to mitigate his damages; that White is estopped from asserting any right to damages because while he was employed with the Employer he was paid well in excess of the contractual wage scale; and that those "extra contractual" wages paid to White should be used to offset any backpay owed. Also, in light of the pending bankruptcy proceedings involving the Employer, Respondent argues that the initiation of a compliance proceeding against it is inappropriate, and that the specification is inconsistent with positions taken by the General Counsel in those bankruptcy proceedings. Respondent also claims that the Employer and Local Union 5921, UMWA are indispensable parties to this proceeding. Finally, in its brief Respondent claims that the Employer should have been held primarily liable and it secondarily liable to remedy the unfair labor practice involving White. Respondent asserts that if its affirmative defenses are found meritless, then the amount of gross backpay it owes is $11,808.38.

III. Analysis

A. <u>General Principles</u>

The Board holds that the finding of an unfair labor practice of the type involved in this case is presumptive proof that some backpay is owed. *La Favorita, Inc.,* 313 NLRB 902 (1994), enfd. 48 F.3d 1232 (10th Cir.1995). Uncertainty and doubt that may be inherent in the process of precisely computing backpay should be resolved in favor of the discriminatee and against the wrongdoer responsible for the existence of the uncertainty. Id., at 903. The General Counsel has the burden of proving gross backpay; it is Respondent's burden to prove facts that would mitigate that amount. Id. at 902. Concerning the backpay formula, any formula which approximates what the discriminatee would have earned had he or she not been discriminated against is acceptable so long as it is reasonable and not arbitrary. Id.

Regarding the search for interim employment, it is not necessary that this be successful, but it does require an honest, good effort to find work. *Lloyd's Ornamental & Steel Fabricators, Inc.*, 211 NLRB 217 (1974). The burden is on the Respondent to show that the discriminatee did not make reasonable efforts to find work. *Thalbo Corp.,* 323 NLRB No. 105 (April 30, 1997).

A respondent is not free to relitigate matters decided in the unfair labor practice proceeding. *Schorr Stern Food Corp.,* 248 NLRB 292 (1980).

The uncertainty and lack of precision that are sometimes an inherent part of the effort to ascertain backpay are even more evident in this case because apparently all the Employer's records which would have been so useful here have been destroyed due to a flood and are not available. Thus, the resolution of the issues raised in this case will turn on the testimony of individuals concerning events that occurred nearly 7 years ago.[2]

B. The Issues

1. The backpay period

As indicated, the General Counsel contends that the backpay runs until January 28, 1991; Respondent contends it ends December 29, 1990. In the previous proceeding the administrative law judge indicated that the Employer "ceased doing business around January 28, 1991." *District 17,* supra at 1053. In the remedy section of his decision, the administrative law judge stated "the period for which backpay is due should run from August 12, 1990, until January 28, 1991, subject to such adjustments as may be indicated at the compliance stage of this proceeding." The General Counsel bases her argument on these findings, which, as indicated, were affirmed by the Board and the court of appeals.

In support of its contention that the backpay period should end earlier, Respondent presented the testimony of Employer-president Tiller. Tiller testified generally that the Employer ceased production at its coal mine sometime before Christmas 1990. Thereafter, it used several supervisors and nonunit employees to perform nonunit work. It also used one unit employee--an electrician--to perform work such as moving the mine equipment out of the mine. I do not credit the testimony of Tiller except where specifically found otherwise. I found Tiller's demeanor to be unpersuasive; his testimony was sometimes evasive and generally imprecise, and his questioning at times was by leading questions.[3] I conclude that Respondent has not established that White's employment would have terminated before January 28, 1991. Accordingly, in the absence of credible, probative evidence to the contrary, I rely on the findings in the prior case. I conclude that the backpay period runs from August 12, 1990, until January 28, 1991.

2. The backpay formula

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[2] As the Employer's president, Claude Tiller, testified, "[i]t's been so dang long [ago] I don't remember... ."

[3] I reject Respondent's assertion that Tiller should be treated as an adverse witness, apparently under Rule 611(c) of the Federal Rules of Evidence. Respondent failed to establish that the Employer should be considered an adverse party in this case. To the contrary, under the circumstances of this case it appears that both the Employer and Respondent would have an interest in attempting to minimize the backpay owed to White. Nor was there any indication of hostility; it appeared that Tiller was fully cooperative with Respondent.

In computing gross backpay, the General Counsel used White's average prelayoff earnings and projected those earnings for the backpay period. Certainly, this is a commonly accepted manner of computing gross backpay. I note that the prelayoff period used by the General Counsel was sufficiently large as to seem to be reliable and that it was the period of time immediately before the layoff. Moreover, the backpay period here is only a matter of months, thereby making it less likely that major events could have occurred that would have made this formula less reliable. Finally, as Field Examiner Morgan testified, the absence of business records from the Employer narrowed the range of possibilities available of the General Counsel in computing gross backpay. This formula results in the computation that White would have worked an average of 49.6 hours a week during the backpay period,[4] for a total gross backpay amount of $22,007.96.

However, as is the case with any gross backpay formula, the general reliability of this gross backpay formula may be negated by the facts in a particular case. Respondent contends that gross backpay should be measured by using the hours worked by an employee who actually worked during the backpay period--John Browning. Using this formula, Respondent computes an average weekly work-week of 35.8 straight time hours and 5.7 hours of overtime, for a total gross backpay of $II,808.38. For this backpay formula to be reliable, it must be established that the employee used in the formula worked hours similiar to the hours the discriminatee would have worked. In support thereof, Respondent presented testimony to that effect from Tiller. However, for reasons stated above, I do not credit his testimony. Thus, Respondent has failed to establish that using the hours worked by Browning would have resulted in a more accurate measure of gross backpay than using the formula espoused by the General Counsel. Accordingly, I shall use the gross backpay formula described in the specification, and I conclude, based thereon, that the amount of gross backpay owed White by Respondent is $22,007.96.

3. Search for work

The General Counsel admits no interim earnings by White. Respondent has not established any such interim earnings but asserts that White has not properly searched for work during the backpay period. The evidence shows that White regularly searched for work after his layoff. During the backpay period White went from coal mine to coal mine looking for work. He did this about every other day. At the hearing he named Southern Star Coal Company, W. P. Coal Company, and Teanik Coal Company specifically as coal mines where he applied for work. In addition, White listed seven other coal mines where he looked for work during the third calendar quarter in 1990; this was representative of the search White made for work in the coal mining industry throughout the backpay period. Also, White applied for work in areas other than coal mining.[5] This certainly satisfies White's obligation to make reasonable efforts to find work.

Respondent relies on a State of West Virginia, Bureau of Employment Programs, Office of Labor and Economic Research, generated computer printout. This doument lists 16 job orders in the coal mining industry in Logan County, West Virginia,[6] for the period of time from

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[4] The parties agree that the proper straight time hourly rate for White is the contractual rate of $16.62 per hour.

[5] I base the foregoing findings on the testimony of White; I find him to be a fully credible witness.

[6] Logan County is where the Employer was located. Based on documents contained in Respondent's brief, I take administrative notice that the population of that county in 1993 was

Continued

August 1990 through January 1991. Of the positions listed, White was clearly not qualified for at least nine of those positions such as accountant, personnel manager, administrative assistant, secretary, and electrician. Thus, that document shows that there were only seven positions available in the county in the coal mining field during a 6-month period. This supports, rather than detracts from, White's explanation of his inability to find work during the backpay period. I conclude that Respondent has not met its burden of showing that White failed to make an adequate search for work.

4. Respondent's affirmative defenses

Respondent's defenses that the grievance involved in the underlying unfair labor practice case was nonmeritorious and that it should have been held secondarily, rather than jointly and severally liable, to pay backpay to White are clearly attempts to relitigate matters decided in the earlier unfair labor practice case. Respondent may not relitigate those matters in a subsequent compliance proceeding. Respondent asserts that the Employer and a local union are indispensable parties to this proceeding, but it does not explain why. Indeed, there is no apparent reason why those parties should be joined in this proceeding to liquidate the amount of money *Respondent* owes to White. Its defense that White's backpay should be offset by the earnings he made above the contractual levels before 1990 is frivolous and deserves no further mention. Finally, Respondent seeks to delay this proceeding until the bankruptcy matter involving the Employer is resolved. However, there is no certain date by which that will happen, and there is no certainty that White will be made whole when that proceeding is completed. In any event, White was unlawfully laid off in August 1990. It is now almost 7 years later and he has yet to be made whole by either the Respondent or the Employer. It is truly regrettable that, for whatever reasons, the time for promptly remedying the unfair labor practice committted against White has already passed. Certainly it would be unconscionable to further delay these proceedings. Respondent's defenses are all meritless.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[7]

43,032.

[7] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

Order

The Respondent, District 17, United Mine Workers of America, its officers, agents, and representatives, shall make Phillip Lee White whole by paying him the amount of $22,007.96, plus interest computed in accordance with *New Horizons for the Retarded,* 283 NLRB 1173 (1987), minus tax withholdings required by Federal and state law.

Dated, Washington, D.C. June 25, 1997

William G. Kocol
Administrative Law Judge